



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	04/07/05	Bill No:	AB 1407
Tax:	Air Quality Fee	Author:	Oropeza
Related Bills:			

BILL SUMMARY

This bill would require the Board to collect a five cent (\$0.05) per gallon air quality fee upon the following:

- The supplier of dyed diesel fuel for specified activities;
- A train operator for diesel fuel used in this state;
- An ultimate vendor for undyed diesel fuel sold by the ultimate vendor to a farmer in a transaction in which the ultimate vendor is eligible for a refund or credit of the diesel fuel tax; and
- A user of undyed diesel fuel for which the user claims a refund of the diesel fuel tax.

Summary of Amendments

The amendments to this bill add definitions, specify the rate of the fee, impose a fee upon a train operator, add refund and credit provisions, and make other clarifying changes.

ANALYSIS

Current Law

Current federal law (Section 4081 of the Internal Revenue Code) imposes an excise tax on producers of \$0.184 per gallon on the removal of gasoline from a terminal or refinery, or upon importers for the entry of gasoline into the United States. This section also imposes an excise tax on undyed diesel fuel at a rate of \$0.244 per gallon.

Under the Diesel Fuel Tax Law (Part 31, Division 2 of the Revenue and Taxation Code, commencing with Section 60001), the state imposes an excise tax of \$0.18 per gallon on the removal of diesel fuel at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person, unless specifically exempted. Specifically exempted from the payment of taxes is diesel fuel that satisfies the specified dyeing and marking requirements.

Dyed diesel fuel is diesel fuel that is dyed under United States Environmental Protection Agency or the Internal Revenue Service (IRS) rules for high sulfur diesel fuel or low sulfur diesel fuel or any other requirements subsequently set by the United States Environmental Protection Agency or the IRS and considered destined for nontaxable, off-highway uses.

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The Sales and Use Tax Law imposes a sales or use tax on the gross receipts from the sale of, and on the sales price of, tangible personal property, unless specifically exempted by statute. Existing law expressly *includes* within the definition of “gross receipts” and “sales price” the amount of any tax imposed by the United States upon producers and importers and the amount of any tax imposed by the state under the Motor Vehicle Fuel Tax Law. The law expressly *excludes* from the definition of “gross receipts” and “sales price” the amount of any tax imposed upon diesel fuel pursuant to Part 31 (commencing with Section 60001).

Therefore, under the existing Sales and Use Tax Law, the computation of sales tax on the sale of gasoline includes the 18.4 cents per gallon imposed at the federal level and the 18 cents per gallon imposed by the State. With respect to sales of diesel fuel, the computation of sales and use tax includes only the 24.4 cents per gallon imposed at the federal level.

Proposed Law

This bill would add Division 29 (commencing with Section 38000) to the Public Resources Code as the California Off-Road Environmental Health and Air Quality Funding Act of 2005 (Act).

AIR QUALITY FEE

This bill would require the **supplier** of dyed diesel fuel in each of the following activities to pay a five cent (\$0.05) per gallon air quality fee:

- The removal or sale of dyed diesel fuel in this state from a terminal rack.
- The removal or sale of dyed diesel fuel in this state from a refinery rack.
- The entry of dyed diesel fuel into this state for sale, consumption, use, or warehousing.
- The removal or sale of blended dyed diesel fuel in this state by the blender of that blended dyed diesel fuel. The number of gallons of blended dyed diesel fuel subject to the air quality fee would be the difference between the total number of gallons of blended dyed diesel fuel removed or sold and the number of gallons of diesel fuel used to produce the blended dyed diesel fuel on which the air quality fee was previously paid.

The fee imposed upon a supplier would not apply to dyed diesel fuel that is required to be shipped and is shipped to a point outside of this state by a supplier pursuant to the contract of sale by either the facilities operated by the supplier or delivery by the supplier to a carrier, customs broker, or forwarding agent, whether hired by the purchaser or not, for shipment to the out-of-state point. The fee also would not apply to dyed diesel fuel that is sold by a supplier to the United States and its agencies and instrumentalities.

The five cent (\$0.05) per gallon air quality fee would also be paid by the following persons:

- A train **operator** for each gallon of diesel fuel used in this state.
- An **ultimate vendor** of undyed diesel fuel sold by the ultimate vendor to a farmer in a transaction in which the ultimate vendor is eligible for a refund of diesel fuel tax or a credit of diesel fuel tax.

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- A **user** of undyed diesel fuel for which the user claims a refund of the diesel fuel tax, as specified. The State Board of Equalization (Board) would collect the amount owing by a user by offsetting the amount of the fee against any refund of diesel fuel tax allowed under specified provisions of the Diesel Fuel Tax Law.

REFUNDS AND CREDITS

Except as otherwise provided, this bill would allow the following persons who have paid the fee on dyed diesel fuel to be reimbursed and repaid the amount of the fee:

- Any person who exports the dyed diesel fuel for use outside of this state. Dyed diesel fuel that is carried from this state in the fuel tank of a motor vehicle is not deemed to be exported from this state.
- Any person who sells dyed diesel fuel to the United States and its agencies and instrumentalities.
- Any government entity that uses the dyed diesel fuel on the highways in this state and pays the diesel fuel tax, as specified.
- Any exempt bus operator that uses the dyed diesel fuel on the highways in this state and pays the diesel fuel tax, as specified.
- Any qualified highway vehicle operator that uses the dyed diesel fuel on the highways in this state and pays the diesel fuel tax, as specified.

Any person eligible to be reimbursed and repaid the amount of the fee would be required to file a claim for refund with the Board that can be supported by the original invoice showing the purchase. The claim for refund would have to be filed within three years from the date of purchase of the dyed diesel fuel, made on a form prescribed by the Board, and contain specified information.

A credit may be given the supplier upon the supplier's fee return and the ultimate vendor upon the ultimate vendor's fee return in lieu of the refund of the fee on dyed diesel fuel exported by the supplier or ultimate vendor for use outside the state in the manner as would entitle a supplier or ultimate vendor to claim a refund, as described.

In addition, a credit may be given to the supplier upon the supplier's fee return or to the ultimate vendor upon the ultimate vendor's fee return in lieu of the refund of the fee on dyed diesel fuel sold to the United States and its agencies and instrumentalities by the supplier or ultimate vendor in the manner as would entitle a supplier or ultimate vendor to claim a refund.

A train operator subject to the fee would be allowed a credit against the amount of fee due on his or her return for an amount equal to the fee imposed on dyed diesel fuel purchased in this state in the same return period as purchased. No credit would be allowed unless the fee imposed has been paid upon the purchase of the dyed diesel fuel by the train operator to a vendor in this state. When the amount of the credit for any return period exceeds the amount of fee due for the return period, the excess would be allowed as a credit against the amount of fee due for succeeding reporting periods or would be refunded.

ADMINISTRATIVE PROVISIONS

This bill would require the Board to administer the fees in accordance with the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code).

The fees would be due and payable to the Board quarterly on or before the last day of the calendar month following the close of the quarterly period to which it relates. The payment of the fee would be filed with a return, in the form prescribed by the Board. All fees imposed would be paid in the form of remittances payable to the Board.

FINANCIAL PROVISIONS

This bill would require the Board to deposit all fees collected in the California Environmental Health and Air Quality Fund (Fund). All interest earned on the moneys would also be deposited in the Fund.

The money deposited to the credit of the Fund would be expended for the following purposes:

- To pay, upon order of the State Controller, for refunds.
- To pay for the administrative costs of the Board of collecting the fee, auditing fee payers, and making refunds associated with the Fund.

The balance of the moneys in the Fund would be transferred by the Controller to the Air Pollution Control Fund for expenditure by the State Air Resources Board for purposes of financing those eligible projects under the Carl Moyer Memorial Air Quality Standards Attainment Program that provide for the retrofitting and repowering of off-road diesel engines.

DEFINITIONS

Many terms used throughout the Act have the same meaning as those terms are defined pursuant to the Diesel Fuel Tax Law. The remaining terms would be defined as follows:

- "Blended dyed diesel fuel" means a mixture of dyed diesel fuel with respect to which an air quality fee has been imposed and any other liquid on which an air quality fee has not been imposed. Blended dyed diesel fuel also means a conversion of a liquid into dyed diesel fuel. Conversion of a liquid into dyed diesel fuel occurs when a liquid that is not included in the definition of dyed diesel fuel and that is outside the bulk transfer/terminal system is sold as dyed diesel fuel, delivered as dyed diesel fuel, or represented to be dyed diesel fuel.
- "Entry" means the importing of dyed diesel fuel into this state. Dyed diesel fuel brought into this state in the fuel tank of a motor vehicle shall not be deemed to be an entry.
- "Farmer" means a person who uses undyed diesel fuel on a farm for farming purposes and has given his or her supplier a certificate described in Section 60503 of the Revenue and Taxation Code to purchase the undyed diesel fuel without the diesel fuel tax.
- "Fund" means the California Environmental Health and Air Quality Fund established pursuant to Section 38020.

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- "Supplier" includes a person who does any of the following:
 - (1) Holds the inventory position in the diesel fuel, as reflected on the records of the terminal operator. A person holds the inventory position in diesel fuel when that person has a contractual agreement with the terminal operator for the use of storage facilities and terminaling services at a terminal with respect to the diesel fuel.
 - (2) Owns, operates, or otherwise controls a refinery used to produce diesel fuel from crude oil, unfinished oils, natural gas liquids, or other hydrocarbons, and from which diesel fuel may be removed by pipeline, by vessel, or at a rack.
 - (3) Enters or imports dyed diesel fuel into this state.
 - (4) Produces dyed diesel fuel by adding dye to diesel fuel at the rack or in the terminal yard or refinery yard in connection with the sale and delivery of the dyed diesel fuel.
 - (5) Produces or converts blended dyed diesel fuel outside the bulk transfer/terminal system.
- "Train operator" includes any person that owns, operates, or controls a diesel-powered train and is licensed as a railroad by a state or federal agency.
- "Vendor" means any person who sells dyed diesel fuel to a train operator and at the time of sale collects the air quality fee from the train operator.

The provisions of this measure would become operative on July 1, 2006.

Background

In 1990, voters approved Senate Constitutional Amendment 1 (Proposition 111) at the June direct primary election. Approval of this measure made operative Assembly Bill 471 (Ch. 106, Stats. 1989) and Senate Bill 300 (Ch. 105, Stats. 1989). These bills, among other things, increased the rate of tax imposed on most motor vehicle fuels from \$0.09 to \$0.14 per gallon, effective August 1, 1990. Further, on January 1, 1991, and each January 1 through 1994 thereafter, the excise tax increased by \$0.01 per gallon to the current \$0.18 per gallon.

Assembly Bill 653 (Papan), introduced during the 1997 Legislative Session, contained a proposal to index the per gallon tax on gasoline and diesel fuel according to the CCPI. AB 653 failed to pass out of the Assembly Committee on Transportation.

Assembly Bill 2114 (Longville), introduced during the 2000 Legislative Session, would have provided for an annually adjusted excise tax rate on gasoline and diesel fuel based on the percentage change in the CCPI. However, those provisions were removed from the May 17, 2000 version of the bill.

Senate Bill 541 (Torlakson), introduced during the 2003 Legislative Session, would have provided for an annually adjusted excise tax rate on gasoline and alternative fuels based on the percentage change in the California Consumer Price Index (CCPI). SB 541 failed to pass out of the Senate Committee on Transportation.

In 2004, Senate Bill 1614 (Torlakson) was introduced to impose a 10-cent per gallon fee on gasoline and diesel fuel. A portion of the fee was intended to finance environmental

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programs that mitigate the air impacts of motor vehicles. That bill was amended in the Senate Committee on Transportation to remove the gasoline and diesel fuel provisions to instead increase the existing gasoline and diesel fuel tax from 18 cents to 23 cents per gallon, provided the retail price of gasoline falls below \$2 per gallon. SB 1614 failed to pass out of the Senate Committee on Transportation.

Two bills similar to SB 1412 also introduced last year were Assembly Bills 2847 (Oropeza) and 3104 (Oropeza). They would have imposed a fee on each gallon of gasoline and diesel fuel. AB 2847 failed to pass out of the Senate Committee on Appropriations, and AB 3104 was amended to remove the fee provisions from the May 20, 2004 version of the bill.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the Center for Energy Efficiency and Renewable Technologies (CERT) and is intended to provide funding for incentives for owners of agricultural pumps, forklifts, locomotives, and marine vessels for purposes of replacing or retrofitting old diesel engines with cleaner diesel technologies under the Carl Moyer Program, and to be used for diesel engine retrofits and replacements.
2. **Identification of fee payers.** This bill would impose a specified fee upon suppliers, train operators, ultimate vendors, and users of undyed diesel fuel. Identifying these fee payers would not be problematic since such persons are either currently licensed with the Board, required to make a report to the Board, or file claims for refund, for purposes of the diesel fuel tax.
3. **This bill should contain a specific appropriation to the Board.** This bill proposes a fee to be imposed commencing on July 1, 2006. However, implementation of the proposed fee program would begin prior to July 1, 2006, which is in the middle of the state's fiscal year. In order to begin to develop reporting forms, hire appropriate staff, and develop computer programs, an adequate appropriation would be required to cover the Board's administrative start-up costs that would not already be identified in the Board's 2005-06 budget.
4. **Legal challenges of any new fee program might be made on the grounds that the fee is a tax.** In July 1997, the California Supreme Court held in *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866 that the Childhood Lead Poisoning Prevention Act of 1991 imposed bona fide regulatory fees and not taxes requiring a two-thirds vote of the Legislature under Proposition 13. In summary, the Court found that while the Act did not directly regulate by conferring a specific benefit on, or granting a privilege to, those who pay the fee, it nevertheless imposed regulatory fees under the police power by requiring manufacturers and others whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating those products' adverse health effects.

Although this measure has been keyed by the Legislative Counsel as a majority vote bill, opponents of this measure might question whether the fees imposed are in legal effect "taxes" required to be enacted by a two-thirds vote of the Legislature.

5. **This bill would not be problematic to administer.** The language contained in this measure was provided as technical assistance by the Board to the sponsor of this measure. As such, this bill would not be problematic for the Board to administer the fee if it were to become law.

COST ESTIMATE

The Board would incur non-absorbable costs to adequately develop and administer a new fee program. These costs would include registering fee payers, developing computer programs, mailing and processing determinations and payments, carrying out compliance and audit efforts to ensure proper reporting, developing regulations, training staff, and answering inquiries from the public. A cost estimate of this workload is pending.

REVENUE ESTIMATE

The State Board of Equalization Fuels Division reports diesel fuel consumption on a monthly basis. In 2004, user refunds amounted to 123 million gallons.

The Energy Information Administrations (EIA) Fuel & Kerosene Sales Report 2003 provided distillate fuel statistics for California. EIA's definition of distillate fuel included diesel and fuel oils. For commercial and industrial use, we have only taken into account the high sulphur diesel statistic specifically provided in the report. Our findings indicated that low sulfur diesel is usually used on highway and high-sulphur is used for non-highway use and is dyed to identify it. Railroad and farm use statistic are also ascertained from the EIA report.

Diesel Gallons Subject To The Proposed \$0.05 Fee

	(Million Gallons)
Commercial Use	0.8
Industrial Use	0.2
Railroad	73.3
Farm Use	77.0
BOE User Refunds	<u>123.0</u>
Total Gallons	274.3

Total revenue generated by this proposal is \$13.7 million (274 million gallons × \$0.05 = \$13.7 million).

Revenue Summary

The \$0.05 fee per gallon proposed by this bill would generate an estimated \$13.7 million in revenues.

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